

Testimony of Montana Association of Realtors®
Senate Natural Resources Committee
61st Session of the Montana Legislature
PROPONENT of House Bill No. 40

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE WATER PERMIT AND CHANGE IN APPROPRIATION RIGHT PROCESS; CLARIFYING THE DEFINITION OF "CORRECT AND COMPLETE"; REQUIRING THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION TO ISSUE A PRELIMINARY DETERMINATION ON A WATER RIGHT PERMIT OR A CHANGE IN APPROPRIATION RIGHT; ~~PROVIDING FOR OBJECTIONS TO BE HEARD IN AN INFORMAL HEARING~~; REQUIRING PERMIT OR CHANGE IN APPROPRIATION RIGHT DECISIONS WITHIN 90 DAYS AFTER CLOSE OF ADMINISTRATIVE RECORD; AND AMENDING SECTIONS 85-2-102, 85-2-307, 85-2-308, 85-2-309, 85-2-310, 85-2-401, AND 85-2-804, MCA."

Dear Chairman Gebhardt and members of the Committee:

For the record, my name is Abigail St. Lawrence, and I represent the Montana Association of Realtors® ("MAR"). MAR represents over 4,600 real estate brokers, property managers, salespersons, and affiliates throughout Montana and is the business advocate for Montana real estate professionals, representing practitioners active in all phases of real estate brokerage, management, development, and appraisal. MAR supports House Bill ("HB") 40 because it is a step in the right direction of providing much needed reform to the water permitting process.

HB 40 would revise the Montana Water Use Act administered by the Department of Natural Resources and Conservation ("DNRC") to improve the process for obtaining a water right permit, including the permit process for larger water systems serving new residential and commercial development. During the 2007-2008 interim, water users expressed to the Water Policy Interim Committee ("WPIC") two primary concerns with the existing process for new beneficial water use applications and applications to change existing water rights: the length of time that the process took and a concern that throughout the process, there was little indication of how DNRC would make its final determination, resulting in objections that could have been avoided with a preliminary decision from DNRC. Additionally, concern was expressed over the time-consuming back-and-forth between DNRC and applicants after an application has gone to public notice regarding additional issues DNRC had identified with the application. The situation is particularly problematic because only very limited changes can be made to an application after it has gone to public notice. Consequently, if DNRC identified additional deficiencies with the application after public notice, applicants could face the choice of going forward with an application they knew would likely be denied or withdrawing and resubmitting significant additional expense in many cases. Either option results in wasted time and money for all involved and, consequently, neither is a desirable result.

HB 40, brought at the request of WPIC, is the proposal from the interim to address some of the concerns with the permitting process raised by water users. Along with Rep. Cohenour, MAR spearheaded an effort with a consensus group to draft a series of amendments to improve the legislation, which amendments were adopted by the House Natural Resources Committee. As amended and now before this committee, HB 40 improves the procedural aspects and takes in to consideration the concerns expressed to WPIC while also avoiding the confusion of mixed messages on burdens of proof at hearings and without altering the substance of the Water Use Act.

Permit process reform is needed, particularly for larger workforce housing developments where public wells are necessary to efficiently provide water for domestic consumption. The current process of obtaining a new beneficial water use permit is expensive and problematic for all parties involved. Applications for a beneficial water use permit average in excess of 500 days to get to a final decision, which may very well be a denial, resulting in only further delay and expense to obtain domestic water for workforce housing. Currently, the significant delay in processing is due, in part, to back-and-forth with DNRC regarding additional "issues" DNRC has with the application after the application has gone to public notice and cannot be changed. HB 40 significantly improves the process by moving the DNRC evaluation up front and by establishing an endpoint to that evaluation – referred to as a "written preliminary determination." *See*, Sec. 2(2)(a)(ii).

HB 40 also addresses a potential conflict of interest in which the DNRC personnel authoring the written preliminary determination granting or denying the permit application could be appointed the DNRC hearing examiner to preside over a contested case hearing between the applicant and objectors. Section 5(1)(b)(i) allows an applicant to request a hearing examiner not involved in the written preliminary determination. This provision provides an option for applicants to address potential conflicts of interest within the DNRC process.

It is important to keep in mind that HB 40 applies to both applicants for new beneficial water use permits and existing water right holders seeking to change their existing water rights. Consequently, this is not a situation where it is exclusively those seeking new water rights versus existing water right holders. In some regards, those with existing water rights are most affected by the permit process, as they are potentially involved as both objectors (to new beneficial water use permit applications) and applicants (for change authorizations). HB 40 strikes an appropriate balance of regulatory and procedural certainty for applicants, as well as procedural clarity and protection of existing water rights for objectors. Please recommend a "do pass" on House Bill No. 40. Thank you, and I will be available for any questions.